Grounds of Public Interest Immunity Claim

It is worth again drawing the Committee's attention to a number of statements reaffirming the practice to which I have alluded. First, there is the statement of former Labor Attorney-General (and member of the Senate), the Hon Gareth Evans AC QC:

> ...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle ...

To similar effect were the remarks of another former Attorney-General, the Hon Daryl Williams AM QC:

> ... I am going to offer the traditional response. I am not going to speculate about advice that the government may or may not have received nor am I going to provide any of that advice ...

Again, former Labor Senator, the Hon Joe Ludwig, who represented the Attorney-General's portfolio in the Senate and occupied the position of Special Minister of State , put the position as follows:

> To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice.

The Hon Philip Ruddock, another former Attorney-General, expressed a similar view:

> ... It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government ...

Thus, whether or not the Senate has accepted that matters pertaining to confidential legal advice to government are always and in all circumstances immune from disclosure is neither here nor there. The fact is that, in general, such matters are not disclosed. Plainly, as I acknowledged at the hearing, there may be exceptional circumstances in which to depart from that general practice. However, no such exception arises in the present context. On the contrary: as I will explain below, the present case is one in which the potential harm of disclosure is particularly acute, and the grounds for non-disclosure thus particularly strong.

The public interest in non-disclosure

It is not in the public interest to depart from the established position that has been maintained over many years by successive governments, from both sides of politics, not to disclose privileged legal advice. Absent exceptional circumstances, it is essential that privileged legal advice provided to the Commonwealth remain confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.

The High Court of Australia has repeatedly affirmed that there is a public interest in maintaining the confidentiality of legal advice. In *Grant v Downs*, Stephen, Mason and Murphy JJ stated:[1]

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.

It has further been recognised that the doctrine of legal professional privilege itself arises from a weighing of the public interest for and against disclosure. In Waterford v Commonwealth, Mason and Wilson JJ opined:[2]

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in "the perfect administration of justice" is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

That view was reaffirmed by Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Limited v Commissioner of Taxation.*[3] Their honours succinctly stated the rationale for the privilege: it "exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers."

It follows from these observations that the specific harm that the doctrine seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client.

It also follows that to invoke the doctrine of legal professional privilege is to identify the specific harm to the administration of justice that the doctrine seeks to prevent.

Here, the Committee's questions go to the heart of the Commonwealth's approach to constitutional litigation in the High Court. Disclosure of advice in this context would mean that in some of the most sensitive litigation faced by the Commonwealth — constitutional litigation with a State — the Commonwealth could no longer be assured that its dealings with its lawyers would remain confidential.

There may be circumstances where there is an overriding public interest in disclosure, notwithstanding a legitimate legal professional privilege claim. Indeed, the common law itself has long recognised that legal professional privilege is not absolute.[4]

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[1] *Grant v Downs* (1976) 135 CLR 674, 685.
[2] *Waterford v Commonwealth* (1987) 163 CLR 54, 64.
[3] *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49, [35]
[4] The privilege does not extend to communications facilitating the commission of a crime or fraud.